

A Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors

B FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(f)-20-09 OF 2014(B)
ARIFIN ZAKARIA CHIEF JUSTICE, RAUS SHARIF PCA, ABDULL HAMID EMBONG, HASAN LAH AND ABU SAMAH NORDIN FCJJ
C 20 JANUARY 2016

D *Evidence — Standard of proof — Claim for future loss or damage in personal injuries civil suit — Future medical and related expenses — Whether standard to be used was strict proof or proof of possible likelihood — Whether balance of probabilities test had to be applied in proving likelihood of future loss or damage happening as well as in assessing such loss or damage — Whether likelihood of future loss or damage happening should not be mere speculative possibility but substantial possibility based on cogent evidence*

E The question of law posed to the Federal Court in the instant appeal, arising from a medical negligence suit, was whether the standard of proof for future loss or damage was strict proof or proof of a possible likelihood. The appellant, suing through her father as next friend, was born at the first respondent's hospital where the second and third respondents – respectively, a medical officer in obstetrics and gynaecology and a consultant paediatrician – were employed. The appellant alleged that because of the respondents' negligence before, during and after her birth, she suffered severe and irreversible brain damage resulting in a condition called quadriplegic spastic cerebral palsy. At the High Court trial of her suit, the respondents conceded liability and the trial proceeded only on the issue of damages. At the end of the trial, the Court awarded the appellant RM1,193,442.39 in damages. Dissatisfied with the quantum, the appellant appealed but the Court of Appeal dismissed the appeal and upheld the award. In the instant appeal, the appellant argued that the trial judge erred in deciding that the standard of proof for claims for future loss or damage was strict/specific proof resulting in the judge either rejecting many of the items claimed for or awarding lower compensation than what was awarded in other comparable cases. The appellant said the correct standard of proof the trial judge ought to have applied was whether there was a reasonable chance or a real and substantial possibility or risk such future loss or damage would occur. The respondents, in reply, argued that the civil standard of proof, ie on balance of probabilities, applied to both special and general damages including present and future loss so that the prospect that future loss or damage would occur had to be proven by that standard. The respondents disagreed that the trial judge

had imposed any strict or specific proof on the appellant to prove her claim for future loss or damage and said the judge had merely held that the appellant had not proven her claims on certain heads of loss or damage.

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Held, upholding the awards made by the trial judge but increasing the quantum for cost of care by parents and family members to RM120,000, granting RM40,000 for cost of training and education for the appellant's care-giver and doubling the quantum awarded for purchase, maintenance and modification of a disabled-friendly vehicle for the appellant:

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- (1) The standard of proof with regard to the assessment of future loss or damage was on the balance of probabilities but with a lower degree of certainty as to the occurrence of such loss or damage in the future. From the authorities, one could say such a lower degree to be attached was best termed by the word 'possibility', 'chance', 'risk', 'danger' or 'likelihood', but regardless of the words used and their semantics, they must also essentially be a substantial one and not speculative, and the standard of proving such 'possibility', 'chance', 'risk', 'danger' or 'likelihood' of the future damage was still on a balance of probabilities. Although it was only necessary to establish that there was a significant prospect, as opposed to a mere speculative possibility, that the appellant might suffer damage in the future, proof of that damage happening and the assessment of that damage was on a balance of probabilities (see paras 24 & 61).

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- (2) There was nothing wrong with the standard of proof applied by the trial judge in considering and evaluating the evidence with regard to the appellant's claim for future loss and damage. There was nothing to suggest she had adopted a different approach to the standard of proof to be applied or that she had come to a wholly erroneous award on the damages. The trial judge's use of the words 'telah tidak dibuktikan oleh plaintiff secara khusus' had to be read in the context of her discussion on the appellant's claim for future medical care. The trial judge was merely dealing with the quality of the appellant's evidence in supporting that claim and in doing so this court could not see how the trial judge could be said to have applied an exceptionally high standard of specific proof or strict proof as contended by the appellant. 'Tidak dibuktikan secara khusus' simply meant that no proof was available, that was all (see paras 25–27).

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- (3) The appellant's contention regarding the applicable standard of proof with regard to future loss and damage was mistaken because while it was true that a plaintiff needed only to show there was a reasonable chance of a loss or damage occurring in order for him to succeed in his or her claim for future loss or damage, the standard of proof required in proving such a claim remained the same, ie on the balance of probabilities. The principles set out in the authorities merely outlined the degree of

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- A certainty to be attached in relation to the assessment of the chance or likelihood that a loss or damage might reasonably happen in the future in a claim for future loss and damage. Such principles related to, and should be understood, in the context of the extent of the evidential value a plaintiff needed to demonstrate to establish the claim for future loss or
- B damage which could be satisfied by the production of related and sufficient evidence from the expert or by some other cogent evidence (see para 17).
- (4) In assessing damages, courts should not be motivated by sympathy but
- C should award fair compensation based on cogent evidence. The court should not descend into the domain of speculation. Evaluation of evidence which formed the basis of any risk of future damage must be undertaken. And the trial judge could only evaluate such evidence based on the recognised 'balance of probabilities' standard which was in accord
- D with the requirement for proof under s 3 of the Evidence Act 1950 (see paras 20 & 22).

[Bahasa Malaysia summary]

- E Persoalan undang-undang yang dikemukakan kepada Mahkamah Persekutuan dalam rayuan ini, yang timbul daripada guaman kecuaiian perubatan, adalah sama ada piawai bukti untuk kehilangan atau kerugian masa depan adalah bukti kukuh atau bukti yang berkemungkinan. Perayu, menyaman melalui bapanya sebagai sahabat, telah dilahirkan di hospital responden pertama di
- F mana responden-responden kedua dan ketiga – masing-masingnya, seorang pegawai perubatan dalam bidang obstetrik dan ginekologi dan pakar perunding kanak-kanak – telah bekerja. Perayu mendakwa bahawa oleh kerana kecuaiian responden-responden sebelum, semasa dan selepas kelahirannya, dia mengalami kerosakan otak yang teruk dan sukar untuk dipulihkan menyebabkan keadaan yang dipanggil 'quadriplegic spastic cerebral palsy'.
- G Dalam perbicaraan guamannya di Mahkamah Tinggi, responden-responden mengakui liabiliti dan perbicaraan diteruskan hanya tentang isu ganti rugi. Pada akhir perbicaraan, mahkamah mengawardkan perayu ganti rugi sejumlah RM1,193,442.39. Berasa tidak puas hati dengan kuantum itu, perayu telah merayu tetapi Mahkamah Rayuan menolak rayuan itu dan mengekalkan
- H award tersebut. Dalam rayuan ini, perayu berhujah bahawa hakim perbicaraan terkhilaf semasa memutuskan bahawa piawai bukti untuk tuntutan kehilangan atau kerugian masa hadapan adalah bukti kukuh/spesifik yang menyebabkan hakim sama ada menolak kebanyakan item yang dituntut atau mengawardkan pampasan lebih rendah daripada apa yang diawardkan dalam kes-kes lain yang
- I setanding. Perayu mengatakan piawai bukti betul yang patut digunakan oleh hakim perbicaraan adalah sama ada terdapat peluang munasabah atau kemungkinan sebenar dan besar atau risiko kehilangan atau kerugian masa hadapan sedemikian akan berlaku. Responden-responden, dalam jawapan mereka, berhujah bahawa piawai bukti sivil, iaitu atasimbangan

kebarangkalian, terpakai kepada kedua-dua ganti rugi khas dan am termasuk kehilangan semasa dan masa hadapan agar prospek yang kehilangan atau kerugian itu akan berlaku perlu dibuktikan oleh piawai tersebut. Responden-responden tidak bersetuju bahawa hakim perbicaraan telah mengenakan apa-apa bukti kukuh atau spesifik ke atas perayu untuk membuktikan tuntutan mereka bagi kehilangan atau kerugian masa hadapan dan hakim tersebut hanya memutuskan bahawa perayu tidak membuktikan tuntutan mereka berhubung kepala tajuk kehilangan atau kerugian tertentu.

Diputuskan, mengekalkan award-award yang dibuat oleh hakim perbicaraan tetapi menaikkan kuantum untuk kos penjagaan oleh ibubapa dan ahli keluarga kepada RM120,000, memberikan RM40,000 untuk kos latihan dan pelajaran bagi penjaga perayu dan menggandakan kuantum yang diawardkan untuk pembelian, penyelenggaraan dan pengubahsuaian kenderaan mesra orang kurang upaya bagi perayu:

- (1) Piawai bukti berkenaan penaksiran kehilangan atau kerugian masa hadapan adalah atas imbalan kebarangkalian tetapi dengan tahap kepastian lebih rendah berhubung kejadian kehilangan atau kerugian sebegini di masa hadapan. Berdasarkan autoriti-autoriti, boleh dikatakan tahap lebih rendah yang diletakkan boleh dinyatakan dengan perkataan 'possibility', 'chance', 'risk', 'danger' atau 'likelihood', tetapi meskipun tanpa mengira perkataan-perkataan yang digunakan dan semantikanya, perkataan-perkataan tersebut juga perlu suatu yang substantial dan bukan spekulatif, dan piawai membuktikan 'possibility', 'chance', 'risk', 'danger' or 'likelihood' tentang kerugian masa hadapan masih atas imbalan kebarangkalian. Walaupun ia hanya perlu untuk membuktikan bahawa terdapat prospek yang besar, berbanding dengan hanya spekulasi kebarangkalian, bahawa perayu mungkin mengalami kerugian di masa hadapan, bukti bahawa kerugian itu berlaku dan penaksiran kerugian itu adalah atas imbalan kebarangkalian (lihat perenggan 24 & 61).
- (2) Tiada apa-apa yang salah dengan piawai bukti yang digunakan oleh hakim perbicaraan dalam mempertimbang dan menilai keterangan berkenaan tuntutan perayu untuk kehilangan dan kerugian masa hadapan. Tiada apa yang mencadangkan beliau telah menggunakan pendekatan berbeza dengan piawai bukti yang terpakai atau bahawa beliau telah tiba kepada award yang salah keseluruhannya tentang ganti rugi. Penggunaan perkataan hakim perbicaraan iaitu 'telah tidak dibuktikan oleh plaintiff secara khusus' perlu dibaca dalam konteks perbincangannya tentang tuntutan perayu untuk penjagaan perubatan masa hadapan. Hakim perbicaraan hanya membincangkan kualiti keterangan perayu dalam menyokong tuntutan tersebut dan dengan berbuat demikian mahkamah ini tidak melihat bagaimana hakim perbicaraan dikatakan telah menggunakan piawai yang sangat tinggi

- A untuk piawai spesifik atau bukti kukuh sebagaimana yang diujah oleh perayu. 'Tidak dibuktikan secara khusus' hanya bermaksud bahawa tiada bukti yang tersedia, itu sahaja (lihat perenggan 25–27).
- B (3) Hujah perayu berhubung pemakaian piawai bukti berkenaan kehilangan dan kerugian masa hadapan adalah disalah anggap kerana semasa ia benar bahawa plaintif hanya perlu menunjukkan terdapat peluang munasabah untuk kehilangan atau kerugian berlaku bagi tujuannya berjaya dalam tuntutan untuk kehilangan atau kerugian masa hadapan, piawai bukti yang dikehendaki dalam membuktikan tuntutan sedemikian masih sama, iaitu atas imbangan kebarangkalian. Prinsip-prinsip yang dinyatakan dalam autoriti-autoriti hanya menggariskan tahap kepastian yang perlu diletakkan berkaitan penilaian peluang atau kemungkinan bahawa kehilangan atau kerugian mungkin munasabah berlaku di masa hadapan dalam tuntutan untuk kehilangan dan kerugian masa hadapan.
- C Prinsip-prinsip tersebut berkaitan dengan, dan hendaklah difahami, dalam konteks tahap nilai keterangan yang diperlukan plaintif untuk menunjukkan dan membuktikan tuntutan untuk kehilangan dan kerugian masa hadapan yang boleh dipenuhi dengan keterangan berkaitan dan mencukupi yang dikemukakan daripada pakar atau oleh keterangan lain yang meyakinkan (lihat perenggan 17).
- D (4) Dalam menaksir ganti rugi, mahkamah tidak patut didorong oleh simpati tetapi patut mengawardkan pampasan yang adil berdasarkan keterangan yang meyakinkan. Mahkamah tidak patut berlandaskan spekulasi. Penilaian keterangan yang membentuk asas apa-apa risiko kerugian masa hadapan perlu dilaksanakan. Dan hakim perbicaraan hanya boleh menilai keterangan tersebut berdasarkan piawai 'balance of probabilities' yang diiktiraf bersesuaian dengan keperluan untuk bukti di bawah s 3 Akta Keterangan 1950 (lihat perenggan 20 & 22).]
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G Notes

For cases on standard of proof in general, see 7(2) *Mallal's Digest* (5th Ed, 2015) paras 2967–2980.

Cases referred to

- H *Chai Yee Chong v Lew Thai* [2004] 2 MLJ 465, CA (not folld)
Gleneagles Hospital (KL) Sdn Bhd v Chung Chu Yin (an infant suing through her father and next friend, Chung Shan Yong) & Ors and another appeal [2013] 4 MLJ 785, CA (refd)
- I *Hariesh Kumar s/o Muthragi v Kerajaan Malaysia & 5 Ors* Civil Suit No MT1–22–915 of 2006 (unreported), HC (refd)
Hawkins v New Mendip Engineering Ltd [1966] 3 All ER 228, CA (refd)
Kerajaan Malaysia v A'aliyah bt Syahril Riza Civil Appeal No W-01–425–10 of 2012 (unreported), CA (refd)
Kovats et al v Ogilvie et al [1971] 1 WWR 561, CA (consd)

- Lim Poh Choo v Camden and Islington Area Health Authority* [1979] 2 All ER 910, HL (refd) A
- Mayathevan a/l Mayandi & Ors v Dr Navin Kumar a/l Batumalai & Ors* Suit No 22–111–07 of 2011 (unreported), HC (refd)
- Miller v Minister of Pensions* [1947] 2 All ER 372, KBD (refd)
- Nurul Husna Muhammad Hafiz & Anor v Kerajaan Malaysia & Ors* [2015] 1 CLJ 825, HC (refd) B
- Ong Ah Long v Dr S Underwood* [1983] 2 MLJ 324, FC (refd)
- Raja Zam Zam v Vaithiyathan* [1965] 2 MLJ 252 (refd)
- Tan Cheong Poh & Anor v Teoh Ah Keow* [1995] 3 MLJ 89; [1996] 3 CLJ 665, CA (refd) C
- Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1, FC (refd)
- Schrump et al v Koot et al* (1977) 82 DLR (3d) 553, CA (refd)

Legislation referred to

Evidence Act 1950 ss 3, 101, 102, 103, 104 D

Appeal from: Civil Appeal No B-01–200–05 of 2013 (Court of Appeal, Putrajaya)

- PS Ranjan (MS Dhillon and KB Karthi with him) (PS Ranjan & Co) for the appellant.* E
- Nik Mohd Noor bin Nik Kar (Nurhafizza bt Azizan and Norazalina bt Razali with him) (Senior Federal Counsels, Attorney General's Chambers) for the respondents.* F

Abdull Hamid Embong FCJ (delivering judgment of the court):

- [1] The appellant was born on 14 May 2007 at Sungai Buloh Hospital, which is owned and operated by the first respondent. The second and third respondents are obstetrics and gynaecology medical officer and consultant paediatrician respectively, who were alleged to have been negligent in the delivery of the appellant and in the proper attending of the appellant and her mother before, during and after the appellant's birth. G
- [2] The appellant, who was suing through her father as her next friend, claimed negligence on the part of the respondents in attending to the appellant's mother's pregnancy which led to the birth of the appellant and in the care and treatment given to the appellant following her birth. The appellant alleged that as a result of the negligence, the appellant was severely and irreversibly braindamaged and has now suffered from quadriplegic spastic cerebral palsy. H
- [3] On the date this matter was set for trial at the High Court, liability was I

A agreed between the parties and the trial proceeded only on the issue of damages. At the end of the trial, the learned High Court judge awarded a total sum of RM1,193,442.39 as damages together with interest and costs.

B [4] Being dissatisfied with the quantum of damages awarded by the High Court, the appellant lodged an appeal to the Court of Appeal. On 24 February 2014, the Court of Appeal dismissed the appellant's appeal and affirmed the award of damages made by the High Court.

C THE QUESTION

[5] The appellant applied to this court for leave to appeal against the decision of the Court of Appeal, which was granted on 18 August 2014 on the following sole question of law:

D Whether the standard of proof for future damage is proof of a possible likelihood as decided by the Courts of Appeal of England and Canada in *Hawkins v New Mendip Engineering Ltd* [1966] 3 All ER 228 (CA) and *Schrump et al v Koot et al* [1977] 18 OR (2d) 337 respectively or on strict proof as decided by the learned trial Judge and accepted by the Court of Appeal?

E THE SUBMISSIONS

F [6] The appellant argued that the learned trial judge had allowed only some items of damages, all of them in sums lower than what were awarded in other comparable cases and rejected completely the claim regarding some other items, even though such items had been allowed in other like cases, including in the Court of Appeal.

G [7] With regard to the claim for future loss and damage, it was argued for the appellant that the learned trial judge had wrongly decided that the standard of proof for such claim was strict proof or specific proof. This, according to the appellant, had resulted in the failure on the part of the learned trial judge to give a proper regard on the evidence available before her and further, resulted in a huge reduction in compensation for future loss and damage in the present case.

H [8] It was contended by the appellant that the correct standard of proof as regards future damage is as that stated in *Schrump et al v Koot et al* (1977) 82 DLR (3d) 553 and *Hawkins v New Mendip Engineering Ltd* [1966] 3 All ER 228 (CA). It was argued that in *Schrump*, the court held that the standard of proof was 'that there is a reasonable chance of such loss or damage occurring'. It was further submitted that a similar approach was also used in *Hawkins* whereby the court used words and phrases such as 'a real and substantial possibility or risk', 'likely future possibilities', 'possibilities that might occur' and other similar terms to denote the possible occurrence of future uncertain

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events as regards the standard of proof required in a claim for future damage.

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[9] Apart from *Schrump* and *Hawkins*, the appellant also cited the cases of *Lim Poh Choo v Camden and Islington Area Health Authority* [1979] 2 All ER 910 and *Nurul Husna Muhammad Hafiz & Anor v Kerajaan Malaysia & Ors* [2015] 1 CLJ 825. It was argued that all these authorities relied heavily on the opinions of experts and their knowledge of relevant facts as regards the future needs of the victims of torts. According to the appellant, their evidence was not to be weighed according to a standard of scientific proof, strict proof, specific proof or even the balance of probabilities. In this regard, it was also contended that s 3 of the Evidence Act 1950 regarding proof of a fact which exists or regarding a fact which does not yet exist cannot apply to the future.

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[10] Learned senior federal counsel for the respondents argued that the civil standard of proof ie on a balance of probabilities applies to both special and general damages. The general damages, which include present and future loss, cannot be said to require a different standard of proof as provided under ss 101–104 of the Evidence Act 1950.

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[11] It was further contended that in cases involving claims for future damage where the evidence of experts are mostly sought, as in the present case, it cannot be said that the plaintiff is exempted from proving his or her claim from the usual standard of proof, that is on the balance of probabilities. In order to succeed, the relevant expert witness must successfully prove that on the balance of probabilities, the proposed claim for future damage is probable to arise in the future. It follows that the evidence must come from a specialist who is an expert in his field, relevant to the claim.

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[12] Learned senior federal counsel argued further that in the present case, the learned trial judge did not place a strict proof or specific proof as the basis for the appellant to prove her claim for future damage. In this regard, the learned trial judge merely stated in her judgment that the appellant had not proven her claims in order for the claims to be allowed.

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STANDARD OF PROOF

[13] The standard of proof in civil cases is the legal standard to which a party is required to prove its case, namely on a balance of probabilities. In civil litigation, the question of the probability or improbability of an action occurring is an important consideration to be taken into account in deciding whether that particular event had actually taken place or not. In the case of *Miller v Minister of Pensions* [1947] 2 All ER 372, Lord Denning said the following about the standard of proof in civil cases:

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- A The ... [standard of proof] ... is well settled. It must carry a reasonable degree of probability if the evidence is such that the tribunal can say: 'We think it more probable than not' the burden is discharged, but, if the probabilities are equal, it is not.
- B [14] With regard to the required proof in the assessment for future damage, the Court of Appeal in *Schrump* had this to say:
- C In this area of the law relating to the assessment of damages for physical injury, one must appreciate that though it may be necessary for a plaintiff to prove, on the balance of probabilities, that the tortious act or omission was the effective cause of the harm suffered, it is not necessary for him to prove, on the balance of probabilities, that future loss or damage will occur, but only that there is a reasonable chance of such loss or damage occurring ...
- D ... Speculative and fanciful possibilities unsupported by expert or other cogent evidence can be removed from the consideration of the trier of fact and should be ignored, whereas substantial possibilities based on such expert or cogent evidence must be considered in the assessment of damages for personal injuries in civil litigation. This principle applies regardless of the percentage of possibility, as long as it is a substantial one, and regardless of whether the possibility is favourable or unfavourable. Thus, future contingencies which are less than probable are regarded as factors to be considered, provided they are shown to be substantial and not speculative: they may tend to increase or reduce the award in a proper case.
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- F [15] On this point, the court in *Schrump* also referred to the judgment in *Kovats et al v Ogilvie et al* [1971] 1 WWR 561 and cited with approval the following passage in the said judgment regarding the assessment of damages for future loss and damage:
- G In assessing damages for personal injuries the award may cover not only all injuries actually suffered and disabilities proved as of the date of trial, but also the 'risk' or 'likelihood' of future developments attributable to such injuries. It is not the law that a plaintiff must prove on a balance of probabilities the probability of future damage; he may be compensated if he proves in accordance with the degree of proof required in civil matters that there is a possibility or a danger of some adverse future development.
- H [16] In referring to *Hawkins*, learned counsel for the appellant contended that the approach which was adopted by the court in that case is in agreement with the principles enunciated in *Schrump* as regards the proper standard of proof applicable in cases involving claims for future loss and damage.
- I [17] Having perused the authorities advanced by learned counsel for the appellant, we are of the view that the appellant's contention regarding the applicable standard of proof as regards future loss and damage was mistaken. We say so because while it is true that a plaintiff needs only to show that there is a reasonable chance of a loss or damage occurring in order for him to succeed

in his or her claim for future loss or damage, the standard of proof required in proving such a claim remains the same, that is on the balance of probabilities. In our understanding, the principles set out in *Schrump* and *Hawkins* merely outline the degree of certainty to be attached in relation to the assessment of the chance or likelihood that a loss or damage might reasonably happen in the future in a claim for future loss and damage. In our view, such principles relate and should be understood in the context of the extent of the evidential value that the plaintiff needs to demonstrate in order to establish the claim for future loss or damage, which can be satisfied by the production of the related and sufficient evidence from the expert or by some other cogent evidence.

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[18] In this regard, we found that the following passage from the judgment in *Kovats* to be useful in discussing the applicable standard of proof with regard to the assessment of future damage:

... It is a fundamental rule that in civil cases questions of fact are to be decided on a balance of probabilities; this is a matter of proof. But it is not equally true that damages in respect of things which have not yet developed may only be awarded if it is probable that they will develop and may not be awarded if it is only possible that they will develop. *One can decide on a balance of probabilities that something in the future is a possibility, and in appropriate circumstances that possibility can be taken into account in assessing damages; in such a case it is not essential, before damages can be assessed for the thing, to decide on a balance of probabilities that the thing in future is a probability ...* (Emphasis added.)

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[19] In addition, the court in *Kovats* also observed that there is an inclination for contradiction when the word ‘probability’ is used as opposed to the word ‘possibility’ as the basis in deciding on the balance of probabilities as to the happening of something in the future and instead suggested using the word ‘risk’, ‘danger’ or ‘likelihood’ to avoid such a confusion. The relevant passage of the judgment is as follows:

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... When the word ‘probability’ is used in such a context there is an inclination to contrast it with the word ‘possibility’. That can be avoided by using instead the word ‘risk’, or perhaps ‘danger’ or ‘likelihood’. Then one can say, without the danger of being misunderstood, that *one can decide on a balance of probabilities that there is a risk of something happening in the future ...* (Emphasis added.)

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[20] It is trite that damages serve as compensation, not a reward, less still a punishment (see *Ong Ah Long v Dr S Underwood* [1983] 2 MLJ 324). In assessing damages, the courts should not be motivated by sympathy and award fair compensation based on cogent evidence. The court should not descend into a domain of speculation. The evaluation of those evidence, which form the basis of any risk of future damage, must therefore still be undertaken. And the trial judge can only evaluate such evidence based on the recognised balance of probability standard. As was stated in *Schrump*:

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A Thus, future contingencies which are less than probable are regarded as factors to be considered, *provided they are shown to be substantial and not speculative*. (Emphasis added.)

B The qualifications as underscored in that sentence is in our considered view, necessary to be proven on a balance of probabilities.

C [21] The British Columbia Court of Appeal in *Kovats* as per the passage we reproduced above, as regards future possibility, had stated that ‘one can decide on a balance of probabilities that something in the future is a possibility ...’, meaning that even the risk of a future damage happening needs to be proven on a balance of probabilities.

D [22] The civil standard of a balance of probabilities is in accord with the requirement for proof under our Evidence Act 1950 where the word ‘proved’ is interpreted in the following manner:

E Section 3 – ‘proved’: a fact is said to be ‘proved’ when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

F [23] This civil standard of proof is emphasised in the recent decision of this court in *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1, a case concerning the standard of proof for fraud in civil claims, where it was held that:

G At law there are only two standards of proof, namely beyond reasonable doubt for criminal cases while it is on a balance of probabilities for civil cases. As such even if fraud is the subject in a civil claim, the standard of proof is on a balance of probabilities. There is no third standard.

H [24] With the above proposition, we are of the view that the standard of proof with regard to the assessment of future loss or damage is on the balance of probabilities, but with a lower degree of certainty as to the occurrence of such loss or damage in the future. From the authorities, one can say that such a lower degree to be attached is best termed by the word ‘possibility’, ‘chance’, ‘risk’, ‘danger’ or ‘likelihood’, but regardless of the words used and their semantics, they must also essentially be a substantial one and not speculative, and that the standard of proving such ‘possibility’, ‘chance’, ‘risk’, ‘danger’ or ‘likelihood’ of the future damage is still, in our opinion, on a balance of probabilities.

I [25] Most importantly, we have also carefully scrutinised the judgment of the learned trial judge. It is settled law that an appellate court will not interfere on a question of quantum awarded by the trial court unless it constitutes a

wholly erroneous estimate (see *Hawkins*). We found that there is nothing wrong with the standard of proof applied by the learned trial judge in considering and evaluating the evidence as regards the appellant's claim for future loss and damage in this case. It is true that the learned trial judge had stated in her judgment that the appellant's claim, 'telah tidak dibuktikan oleh Plaintiff secara khusus ...' but this phrases should be read in the context of the discussion made by the learned trial judge therein when dealing with the appellant's claim for future medical care. In this respect, it is to be noted that the appellant sought for cost of future medical treatment at a private hospital. The main reason given by the appellant's father for not pursuing the treatment at the public hospital was because of the long wait he had to endure. The learned trial judge however felt that the reason given was not sufficient since the appellant's father had failed to prove the specific duration for which the appellant herself had to endure and how many times she herself experienced such a long wait before being given the necessary treatment at the public hospital. Further, the learned trial judge also found that there was no proof or evidence to support the appellant's version in this regard. What was in evidence was merely that the appellant's father chose not to go to a public hospital. The relevant passage of the learned trial judge's finding is reproduced as follows:

... Telah tidak dibuktikan oleh plaintiff secara khusus jangkamasa yang dialami semasa ingin menerima rawatan dan berapa kalikah plaintiff telah menerima rawatan di hospital kerajaan yang menyebabkan plaintiff menunggu lama untuk sesuatu rawatan. Apa yang ada di hadapan mahkamah ini, hanyalah keterangan yang mengatakan bapa plaintiff sendiri yang memilih untuk tidak pergi ke hospital kerajaan dengan memberi alasan bahawa beliau terpaksa menunggu lama untuk menerima rawatan. Tiada bukti atau keterangan untuk menyokong versi beliau ...

[26] From the above passage of the judgment, we are of the view that the learned trial judge was merely dealing with the quality of the evidence of the appellant in supporting her claim and in doing so, we do not see how the learned trial judge can be said to have had applied an exceptionally high standard of specific proof or strict proof as contended by the appellant. 'Tidak dibuktikan secara khusus' to us simply means that no proof was available, that is all.

[27] The learned trial judge in her judgment had also, a number of times, said 'tidak dibuktikan' as regards certain items for future loss and damage. The learned judge had considered the evidence and gave reasons for her findings in relation to those claims. We also found nothing in the judgment to suggest that the learned trial judge had adopted a different approach with regard to the standard of proof to be applied in relation to the appellant's claim for future loss and damage, or that she had come to a wholly erroneous award on those damages.

A THE AWARDS

[28] We shall now deal with the awards made by the learned trial judge of the High Court, specifically as regards to the appellant's claim for future damage.

B [29] For convenience, we reproduce in full the awards which have been made by the learned trial judge at the end of trial with regard to future general damages:

C	(a) Medical care and hospital treatment	RM20,660
	(b) Cost of physiotherapy, occupational therapy and speech therapy	RM134,400
	(c) Mechanical aids and appliances	RM136,000
D	(d) Cost of carers	RM192,000
	(e) Cost of care by parents and family members	RM 72,000
	(f) Cost of training and education of care giver	Not allowed
E	(g) Costs of periodical care	Not allowed
	(h) Cost of the purchase, maintenance and modification of a disabled-friendly vehicle	RM89,000
	(i) Cost of renovation for disabled-friendly home	RM80,000
F	(j) Cost of special clothes, diapers, disposal diapers and creams	RM33,600
	(k) Cost of future surgery	RM25,000
	(l) Pain and suffering arising from future surgery	Not allowed
G	(m) Cost of special food and nutrition	Not allowed
	(n) Cost of accommodation and living expenses after the appellant attaining the age of 18 year	Not allowed
	(o) Cost of special education and training	Not allowed
H	(p) Cost of holidays	Not allowed

[30] However, for the purpose of the present appeal, we shall confine and deliberate on the items claimed by the appellant with regard to future loss and damage as argued and raised in the appeal before the Court of Appeal, under the following heads.

H *Medical care and hospital treatment*

I [31] The appellant sought for the cost of medical treatment at a private hospital and claimed for a sum of RM4,200 per year. The learned trial judge however allowed only one-third of the claim at RM1,033 per year after finding that the grounds advanced by the appellant were not sufficient to justify the appellant for full cost in opting for private medical treatment. The learned trial judge reasoned, inter alia, that the types of treatment sought by the appellant are available at the public hospital; that the appellant's father who was a retired

teacher would be able to obtain facilities provided by the public hospital; that the long wait was not a sufficient proof of non access; and the increasingly better medical services provided in the public hospital.

A

[32] The Court of Appeal affirmed the award made under this head of claim by the learned trial judge and held that the order of the learned trial judge was in line with the principle laid down in *Chai Yee Chong v Lew Thai* [2004] 2 MLJ 465 and *Gleneagles Hospital (KL) Sdn Bhd v Chung Chu Yin (an infant suing through her father and next friend, Chung Shan Yong) & Ors and another appeal* [2013] 4 MLJ 785.

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[33] Learned counsel for the appellant submitted that the Court of Appeal was in error in saying that the learned trial judge had acted in line with the principle laid down in the above two cases in awarding only one-third of the appellant's claim for cost of future medical treatment, when in fact there is no such principle. It was contended that *Chai Yee Chong* concerned a claim for past private medical treatment and therefore is not relevant to the present case. Further, it was submitted that there were discussions in *Chai Yee Chong* of a practice of allowing only one-third of past private medical treatment expenses but that practice was not made a principle as understood by the Court of Appeal.

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[34] The appellant argued that the Court of Appeal was also in error in this case in not following its earlier decision in *Gleneagles* as regards future private medical treatment whereby the full cost of future private medical treatment was allowed, subject to a reduction of 30%, after taking into account factors such as advance lump sum payment and the contingencies of life in the future. In contrast, the appellant argued that the Court of Appeal had in fact misunderstood its own earlier decision in *Gleneagles* when holding that the court had granted one-third of the amount claimed for future medical treatment in that case without considering the fact that 70% of the full future cost was allowed.

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[35] Learned senior federal counsel for the respondent argued that the application of 'one-third practice' as propounded in *Chai Yee Chong* is not limited to only the cost of private medical treatment which has been incurred, but such practice was followed by a number of cases including *Gleneagles*. It was submitted that evidence must be led at trial to address on the appellant's needs and in the absence of such evidence, the court should dismiss the claim altogether or award a sum not exceeding one-third of the amount claimed. In this case, it was argued that the appellant merely made an assumption of the cost of future medical treatment at the private hospital and as such the learned trial judge had correctly allowed only one-third of the amount claimed, which the learned judge felt was a reasonable amount.

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A [36] In this respect, we are in agreement with the contention of the appellant that the case of *Chai Yee Chong* is not relevant to the present case. We respectfully say that the Court of Appeal had erred in coming to its conclusion that the award made by the learned trial judge was in line with the current practice on the strength of the decision in *Chai Yee Chong*, which is a case concerning a claim for past private medical treatment. In determining a claim for future medical treatment, be it at a private, or at a public hospital, the question of reasonableness in making such a claim should always be the paramount consideration. The plaintiff not only needs to justify, for instance, why he chooses treatment at a private hospital over a public one, but he must also show that the amount claimed for such treatment is reasonable. Of course this can be satisfied by the production of compelling evidence for that purpose. It is to be noted that in claiming for the cost of future damage in *Gleneagles*, evidence was led as to the cost of rehabilitation care of the first respondent and the costing was obtained from the private hospitals/centres.

D [37] Nevertheless, in the present case, we found that the learned trial judge had considered the reasons advanced by the appellant in claiming for the cost for future medical treatment at the private hospital and was not persuaded to award the full cost claimed by the appellant. The learned trial judge had given her reasons for awarding only one-third of the amount claimed by the appellant. We affirm the award made by the learned trial judge in this respect, but on a different ground. We found that the amount awarded by the learned trial judge was fair and reasonable, and we do not find any justification to disturb the same.

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Cost of carers

G [38] Under this head of claim, the appellant claimed the cost for the services of two Muslim Filipino maids on the basis of RM27,000 per year at RM1,500 per month x 1[bd] maids (with a half reduction for the second maid). The learned trial judge however awarded the cost for one Indonesian maid on the basis of RM9,600 per year at RM800 per month x 1 maid. The learned trial judge reasoned that there would be no necessity for two maids to care for the appellant based on her own assessment and by the appearance of the appellant in court. The learned trial judge found that the appellant only weighed 9kg at the age of six years and would not be active like a normal child and therefore would not pose any difficulty for care by a single maid. The learned trial judge also reasoned that the engagement of two maids might cause a logistical problem and that the service of an Indonesian maid would be more appropriate in terms of culture and communication.

I [39] The appellant argued that the award made by the learned trial judge in this regard was not consistent with the awards which have been made by the

courts in cases such as *Raja Zam Zam v Vaithiyathan* [1965] 2 MLJ 252; *Kerajaan Malaysia v A'aliyah bt Syahril Riza* Civil Appeal No W-01-425-10 of 2012 (unreported) (CA); *Nurul Husna Muhammad Hafiz & Anor v Kerajaan Malaysia & Ors* [2015] 1 CLJ 825; *Hariesh Kumar s/o Muthragi v Kerajaan Malaysia & 5 Ors* Civil Suit No MT1-22-915 of 2006 (unreported), Johor Bahru High Court; and *Mayathevan all Mayandi & Ors v Dr Navin Kumar all Batumalai & Ors* Suit No 22-111-07 of 2011 (unreported), Melaka High Court. It was argued that in these cases, the cost and expenses of engaging two maids (but usually with a reduction for the second one) had been allowed.

[40] We are of the view that the learned trial judge was correct on her analysis and we do not find any reason to disturb the award made by her in this regard.

Cost of care by parents and family members

[41] The learned trial judge allowed RM300 per month, as compared to the amount claimed by the appellant at RM800 per month. The learned trial judge reasoned that the burden of taking care of the appellant would be lessened with the service of maid and that it is the responsibility of the appellant's parent to give a proper care to her regardless of whether the appellant was born normal or otherwise. The learned trial judge also opined that the award made under this claim should not be seen as enriching the appellant's parents.

[42] The award of the learned trial judge was affirmed by the Court of Appeal, but premised on the application of one-third practice propounded in the case of *Chai Yee Chong*. The appellant argued that the award of the learned trial judge was manifestly low and that the Court of Appeal, in affirming the said award, had misapplied the case of *Chai Yee Chong* to the present case. We agree. First, we would like to reiterate that *Chai Yee Chong* is not applicable in this case. Secondly, we are of the view that the application of the one-third practice is totally inapplicable in the present case simply on the basis that parental care cannot be given by a substitute in a government or private hospital.

[43] The value of care provided to a disabled person by family members had been given recognition. In *Tan Cheong Poh & Anor v Teoh Ah Keow* [1995] 3 MLJ 89; [1996] 3 CLJ 665 where it was held that:

No doubt the plaintiff's mother has been providing her services free of charge to her handicapped daughter but the courts have always compensated plaintiffs for the true value of the services that the plaintiff needs even though it is provided by a parent or other relative.

[44] The appellant's mother, during her testimony explained that she worked as a kindergarten teacher with a salary of RM1,300 per month. In her

- A evidence, the appellant's mother also testified that she had decided to cease from pursuing her diploma in education in order to give full attention and care to the appellant. The appellant's mother also provided evidence on her and her husband's struggle and hardship in taking care of their handicapped daughter.
- B [45] It can be seen from the evidence of the appellant's mother that if not for the imposing necessity to take care of the appellant, she would not have ceased her study and might have possibly pursued her diploma, and hence have a better opportunity to develop her career. Tending to the appellant is also
- C exhausting and stressful whereby the appellant's mother had to wake up at night to attend to the appellant. We are respectfully of the view that the award of RM300 per month made by the High Court was erroneous in the
- D circumstances and we feel that an award of RM500 per month would be a fair and reasonable amount in the circumstances of the case and in accord with other comparable cases.

Cost of training and education of care giver

- E [46] Learned counsel for the appellant stressed to us that the claim for the cost of training and education of a care giver had been allowed in some other decided cases. According to learned counsel, the appellant's parents and carers would need to be educated and trained from time to time to provide for the appellant's needs. It was submitted that a sum of RM2,000 per year for such training and education would be reasonable.
- F
- G [47] The learned trial judge however did not allow the appellant's claim for this item. The learned trial judge was of the view that there was no necessity to award such a claim and reasoned that the appellant's mother who was a kindergarten teacher would be able to guide the care giver and would provide the best way to take care of the appellant. The Court of Appeal agreed with the reasoning of the learned trial judge and found no error on her part in dismissing this item of claim.
- H [48] With respect, we differ. In our considered view, the kind of training and education needed for the carer of special children such as the appellant would be very much different from the training provided for the normal kindergarten teacher. Further, we are of the view that a proper training and education is necessary to be provided to the appellant's parents and carers from time to time so as to meet the development and needs of the appellant. We therefore allow
- I this head of claim for RM2,000 per year for 20 years, to be paid for with in a lump sum.

Cost of the purchase, maintenance and modification of a disabled-friendly vehicle

[49] The appellant claimed for the cost of the purchase, maintenance and modification of a disabled-friendly vehicle at the sum of RM488,000 with replacements for every seven years over a period of 24 years (after deducting one-third for the incidental use by other family members of the appellant). The learned trial judge allowed the claim at RM89,000 as a one-off purchase for 20 years. The learned trial judge observed that the type of vehicle proposed by the appellant was of a luxurious class and the sum claimed for the purchase was excessive and unreasonable. In contrast, the learned trial judge found that there were similarities in terms of usage and functions from the vehicle proposed by the respondent to the one proposed by the appellant. Further, the learned trial judge also took into account the fact that the appellant's family was considerably small and therefore found that the respondent's proposed vehicle was more appropriate in the circumstances of the case.

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[50] Learned counsel for the appellant argued that the award made by the learned trial judge was manifestly low and that no account was taken of the expense of such items as petrol, repairs, maintenance, insurance and road tax.

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[51] In our considered view, the award made by the learned trial judge for a one-off purchase of the vehicle over a period of 20 years was inappropriate and unreasonable in view of the normal life span of a vehicle. We therefore allowed the claim at RM89,000 but with two purchases over a period of 20 years.

E

Cost of special clothes, diapers, wipers and creams

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[52] The appellant claimed for the sum of RM500 per month for the cost of special clothes, diapers, wipers and creams. The learned trial judge however allowed the sum of RM140 per month for this item of claim. The learned trial judge was of the view that based on the available evidence, the more relevant need of the appellant would be the disposable diapers. The learned trial judge also found no evidence to support the appellant's claim on the need for special clothes and the types of cream for the use of the appellant. We found that the award of the learned trial judge was reasonable and see no justification to disturb the same.

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Damages for pain and suffering arising from future surgery

[53] The appellant claimed damages for future pain and suffering for any future surgery in the sum of RM50,000. The learned trial judge however dismissed this claim in view of the fact that the award of RM350,000 had earlier been awarded to the appellant as damages for pain and suffering. According to the learned trial judge, the sum of RM350,000 was awarded for the whole period and to include the appellant's future pain and suffering. It was

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A contended by the appellant that damages under this item of claim had been allowed in some other cases and therefore urged the court to award the same.

[54] We found that the learned trial judge was justified in dismissing the appellant's claim for this item and as such the appeal on this award is not allowed.

Cost of special food and nutrition

C [55] It was argued that the appellant would require specially prepared food and nutrition for the rest of her life and therefore the award in the sum of RM400 per month was proposed by the appellant for this claim. The learned trial judge dismissed this claim as she found that there was no evidence to support the appellant's contention that the appellant would need any special food and nutrition. The learned trial judge also reasoned that regardless of the D appellant's condition, the appellant's father would surely have to provide healthy food for their family members. We affirm the learned trial judge's finding on this award.

E *Cost of accommodation and living expenses after the appellant attaining the age of 18 year*

[56] Learned counsel for the appellant submitted that the appellant's parents are obliged in law to provide care to the appellant only until she reaches the age of 18 years. Nevertheless, after the age of 18 years, the appellant's parents would have to continue to provide her needs. The appellant cited several cases where similar claims had been allowed by the courts. Therefore, the appellant claimed for the sum of RM2,000 per month for future cost of accommodation and living expenses after the appellant reaching the age of 18 years.

G [57] The learned trial judge dismissed the appellant's claim, to which we agree. We found that the learned trial judge had correctly observed that the award for modification of the appellant's parents' house had already been given to cover the appellant's future need for accommodation for the rest of her life, H and hence no necessity for further award to be made under this claim.

Cost of respite care and holidays

I [58] The appellant claimed the sum of RM3,000 for each item for cost of respite care and holidays respectively. The learned trial judge dismissed the appellant's claim for both items of claim. With regard to the appellant's claim for the cost of respite care, the learned trial judge opined that respite care would be normally left to close family members and that the appellant had sufficiently been awarded the cost of hiring a maid to assist. The learned trial judge was also

not persuaded to award the cost of holidays as she was of the view that going for holidays is something which is common in our society and that the appellant's family would have in any event incurred such a cost regardless of the fact of the respondents' negligence.

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[59] We found no error in the assessment of the learned trial judge in this regard and have no reason to interfere with her findings.

B

CONCLUSION

[60] For these reasons, we uphold the awards made by the learned trial judge of the High Court as regards future damage and loss, save the following three items of claim:

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- (a) the cost of care by parents and family members is increased to RM120,000 (on the basis of RM500 per month for 20 years);
- (b) the cost of training and education of care giver is allowed in the sum of RM2,000 per year for 20 years, totalling RM40,000; and
- (c) the cost of the purchase, maintenance and modification of a disabled-friendly vehicle in the sum of RM89,000 as awarded by the learned trial judge is maintained, but with two purchases over the period of 20 years, totalling RM178,000.

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[61] The question posed to us in this appeal may now be answered this way. Although it is only necessary to establish that there is a significant prospect as opposed to a mere speculative possibility that the appellant may suffer damage in the future, proof of that damage happening and the assessment of that damage is on a balance of probabilities.

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[62] In the premises, we allow this appeal in part. Parties to bear their own costs.

G

Awards made by the trial judge upheld but increasing the quantum for cost of care by parents and family members to RM120,000, RM40,000 granted for cost of training and education for appellant's care-giver and quantum awarded doubled for purchase, maintenance and modification of a disabled-friendly vehicle for appellant.

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Reported by Ashok Kumar

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